IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 158 OF 1994

Gulam Ahmed Bashay ..Petitioner
versus
Z. H. Kazi & Anr. ..Respondents

Ms. S. S. Kaushik for the Petitioner.
Ms. R. S. Panjwani for the Respondent No.1.
Mr. P. S. Hingorani, APP for the State.

CORAM : D. G. DESHPANDE, J.
DATE : 4TH APRIL, 2006

ORAL ORDER (IN CHAMBER) :

1. This petition was before me for final hearing. On 31.1.2000 I heard Advocate for the respondent No.1 and learned APP. Nobody was present for the petitioner, and on merits, I passed the order dismissing the petition and discharging the Rule. Thereafter, in August 2000 an application was made for recalling the order dated 31.1.2000 for giving opportunity to the petitioner to argue the main petition on merits. At that time, itself the Advocate for the Respondents had taken preliminary objection to the maintainability of this petition.

2. 31.8.2000 I heard the Advocates and decided that the matter to be heard on merits along with preliminary objection. Thereafter, the matter went to different Judges and ultimately it has come to me, again. Today, I heard Advocate for the Petitioner, Respondent No.1 and the learned APP.

3. Petitioner who is the Branch Manager of Bhiwandi Branch of Bombay Mercantile Co-operative Bank Limited, had filed a complaint against the respondent No.1 before the Magistrate. Magistrate ordered enquiry under Section 156(3) of the Criminal Procedure Code and the investigation was given to Crime Branch and the Officer of the Crime Branch Mr. Korde filed his report before the Magistrate. Copy of the report is there on record. In that report he has stated that he has recorded statement of about 57 witnesses and perused Audit Report for the relevant period. He noted that none of the customers of the bank to whom the respondent No.1 had advanced loan had complained against respondent No.1 about cheating them, about obtaining their signatures on blank papers or about taking any commission or about not giving the amount agreed. All those documents were therefore placed before the

Magistrate and the Magistrate passed the impugned order dated 7.10.1993 dismissing the complaint and discharging the accused. It is against this order that the present Petition was filed.

4. Preliminary objection of the respondent no. 1 to the maintainability of this petition is that it was open for the petitioner and it was necessary for them to challenge the order of the Magistrate by filing Revision before the Sessions Court. That was not done, and, therefore according to her, this petition is not maintainable. Secondly, she pointed out that even before the Magistrate the complainant never appeared and the Magistrate have to pass the order on the basis of the record. She produced before me, zerox copy of the Roznama of the said Case. It clearly shows that excepting on the date of filing of the complaint on other subsequent occasions the complainant remained absent. Report of the Crime Branch came to be filed on 10.6.1993. Thereafter, the matter was adjourned for more than 3-4 times and ultimately on 7.10.1993 Magistrate passed the impugned order dismissing the complaint and discharging the accused. She also pointed out that when this petition came up for hearing nobody

appeared for the petitioner. Then she also pointed out that even though in my earlier order dated 18.3.2006, I have saddled cost of Rs.2,500/- upon the petitioner, the same is not paid till this date, till this moment. Looking therefore to all the circumstances, according to her, the complainant is reckless and negligent in prosecuting his case before the Magistrate, as well as, before this court, and also for non payment of cost, the petition is liable to be dismissed.

5. So far as merits are concerned, she drew my attention to the Report of the Crime Branch officer and the Order of the Magistrate and stated that there are no allegations of misappropriation by the petitioner against the Respondent No.1, and even the Auditors in their report have stated that whatever mistakes were there, they were only of technical nature and administrative type. Even the Auditors in consecutive reports did not note any illegality being committed by the respondent No.1. Therefore, on merits, according to her the petitioner’s case is liable to be dismissed. Learned APP has also supported the Order of the Magistrate

6. As against this, counsel for the petitioner contended that it was not proper on the part of the Magistrate to decide the complaint only on the basis of the report of the Crime Branch without perusing the original statements and the audit report. She also pointed out that audit report was not bound to show or likely to show any falsities or fabrication of documents.

7. So far as preliminary objection of the respondents is concerned, it is required to be upheld. The order was passed by the Magistrate discharging the accused and dismissing the complaint. Against the order of the Magistrate, the Revision was maintainable, and, when this remedy was available, they did not avail of that avenue. To the contrary, my attention was drawn to the fact that even though the Magistrate had passed order on 7.10.1993, the petitioner for the first time applied for the certified copy after about 80 days, this clearly shows that the petitioners were not only negligent in prosecuting the case but they did not even cared to see or find out what has happened before the Magistrate on 7.10.1993. Applying for certified copy after more than 80 days clearly shows

that the petitioners were not at all concerned with the fate of their petition and they were taking the things for granted. Secondly, even on merits the order of the Magistrate is not required to be set aside because whatever material was available before the Magistrate was in the form of report of the Crime Branch and the audit reports. Magistrate has considered all those documents and has noted that none of the borrowers from the bank had made any complaint against the respondent No.1. Making allegations of this type is almost easy but it was necessary for the complainant to substantiate those allegations, firstly, by remaining present in the court, secondly by giving sufficient material to the Magistrate. Admittedly, the petitioners have miserably failed to satisfy the Magistrate, they were totally negligent in their case even though the complaint was filed with so many allegations, continuous absence of the Advocate of the complainant and the complainant before the Magistrate, left the Magistrate with no alternate but to pass orders on the basis of the record that was available before him. It is not that the Magistrate relied upon any defence of the accused but he based his conclusions on the report of Crime

Branch and the documents submitted. Therefore, for the following reasons, petition has to be dismissed.

(1) Firstly, for non compliance to the order of the Court about payment of cost of Rs.2,500/- even though sufficient time was given to the petitioner to pay cost, which was a condition precedent.

(2) Secondly, the petition itself is not maintainable because the petitioner could have and should have filed Revision against the order of the Magistrate.

(3) Thirdly, even on merits the Magistrate’s order does not require interference.

(4) Fourthly, before the Magistrate, the complainant was reckless and negligent. He did not care for his case at any time after filing the complaint, applying for certified copy after about 80 days, this

indicates the apathy of the complainant in this matter. Before me also nobody appeared for petitioner, earlier.

For all these reasons, no interference is called for. Petition is dismissed. The order of the Magistrate is upheld.

(D.G. DESHPANDE, J.)